

COMMERCIAL CASE NO. 124 OF 2014

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VERSUS

JUDGMENT


SEHEL, J.

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sandals, bags and other accessories to be delivered to the plaintiff in order to sell the goods to the 3rd defendant.

It is alleged by the plaintiff that on 15th May, 2012 the plaintiff entered into a master Murahaba facility agreement (hereinafter after referred to as "the agreement") with the 3rd defendant in order to grant a loan of the total sum of Tanzanian Shillings Two Hundred Million (Tshs. 200m). The agreement was secured by a landed property located at Plot No. 229, Block G, Same Urban Area, Kilimanjaro City, under Certificate of Title Number 16253 in the name of Shabani Athumani Mkwama and the spouse consent of Habiba Mshana was provided in support of the legal mortgage. The plaintiff averred that under the agreement the plaintiff is to buy 700 bags of shoes, sandals and other footwear (hereinafter referred to as "the goods") from Trimex and Shoes Trading Company based in the United States of America at a price of Tshs. 200m and thereafter sell the goods to the 3rd defendant by way of Murahaba, that is, cost (being the loan amount) plus profit (being the mark up profit) at a

total price of Tanzanian Shillings Two Hundred Twelve Million and Six Hundred Thousand (Tshs. 212,600,000/=).

It is further alleged that on 24th September, 2012 the 1st defendant as a director of the 3rd defendant wrote to the plaintiff to inform that the delivery of goods has been delayed and that it was expected to arrive in Dar es Salaam in December, 2012 as a result the 3rd defendant requested and the plaintiff agreed to amend the terms of the agreement. Following amendment of the agreement, the 1st and 2nd defendants signed a Directors' Personal Guarantee for unlimited amount dated 20th November, 2012 (hereinafter referred to as "the guarantee") to guarantee the loan advanced to the 3rd defendant. The plaintiff further alleged that the 3rd defendant requested for a second amendment of the loan by way of restructuring and on 18th March, 2013 a ten percent (10%) of the loan, Tanzania Shillings Twenty Million, was paid for purposes of restructuring since it is a regulatory requirement by the Bank of Tanzania. The terms of the restructured loan were: 

- ✓ The repayment shall be made in twenty four (24) monthly instalments of Tanzania Shillings Ten Million, Six Hundred Seventy Five Thousand (Tshs. 10,675,000/=) each;
- ✓ The tenure of the loan shall be twenty four (24) months;
- ✓ The total mark up profit to be charged shall be Tanzania Shillings Fifty Six Million and Two Hundred Thousand (Tshs. 56,200,000/=).

The plaintiff also alleged that on 15th April, 2013, the goods were sold to the 3rd defendant and the 3rd defendant through the 1st defendant signed the Bank's acceptance letter, the offer to purchase, and schedule of payment of contract price to acknowledge receipt of goods and confirm the newly agreed terms with effect from 11th May, 2013. However, the 3rd defendant defaulted in repaying the loan therefore a sixty days default notice was issued to the 3rd, 1st, and 2nd defendants requiring them to repay the outstanding sum failure of which the plaintiff shall exercise her right of selling the mortgaged property. The plaintiff tried to dispose ~~the~~

the mortgaged property by way of public auction but was faced with resistances from the defendants and also failed to secure the loaned amount. The maximum amount of the bids offered were Tanzania Shillings Five million (Tshs. 5m).

Upon failure to sell the mortgaged property the plaintiff became aware of other property owned by the 1st defendant namely a landed property located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipality with residential licence number 29387; KND/NGB/KGM4/39 (hereinafter referred to as "the disputed property"). By way of guarantee, the plaintiff decided to attach the disputed property and on 21st July, 2015 an interim order was issued. The plaintiff allege in the plaint that she placed three different caveats. The first caveat was placed on 30th October, 2014 and it was renewed on 6th May, 2014. But the third caveat placed on 10th November, 2015 was refused by the Municipal Council on the basis that the disputed property was not subject to mortgage and that an ~~was~~

application for transfer made by the 4th defendant should continue who bought the disputed.

In an attempt to recover the loan, the plaintiff filed the present suit claiming against the defendants jointly and severally for:

1. Payment of Tanzania Shillings Two Hundred Forty Seven Million, One Hundred Thirty One Thousand, Five Hundred and Nine and Sixty Two Cents only (Tshs. 247, 131, 509.62) being the outstanding amount on account of the Murabaha Facility as of 17th September, 2014;
2. Payment of the legal costs and advertising fees in the sum of Tanzania Shillings Three Million Nine Hundred and Fifty Thousand (Tshs. 3, 950,000/=);
3. An order of annulment of the alleged sale of KND/NGB/KGM4/39 located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipality with residential licence number 29387 to the 4th defendant;

4. An order of attachment, vacant possession and sale against the 1st defendant as a Personal Guarantor over property number KND/NGB/KGM4/39 located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipality with residential licence number 29387 in the name of Shabani Athumani Mkwama;
5. Costs of the suit; and
6. Any other relief(s) that the Court may deem fit to grant.

The defendants after being dully served with the plaint, the 1st, 2nd and 3rd defendants jointly filed their written statement of defence. In their defence the defendants denied the plaintiff's allegations and claimed that the plaintiff has no bonafide claim against the disputed property and acknowledged that the 1st defendant owns the mortgaged house situate at Same whose value is above the loaned amount. They further denied generally that the goods ordered were delivered to or handed over to them and

therefore they cannot repay the loan for the goods never delivered to them.

The 4th defendant on his part averred that he is the lawful owner of the disputed property which he lawfully bought it from the 1st defendant on 11th February, 2014 at a total price of Tanzania Shillings Two Hundred and Twenty Millions (Tshs. 220,000,000/=). He paid the purchase price in three instalments to the 1st defendant.

The suit passed through mediation but parties failed to reach to settlement agreement. Mediation was marked as failed on 20th day of April, 2017. Pursuant to Rule 49 (2) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules") the plaintiff filed one witness statement of **Ayoub Omari Korogoto** which on 5th day of December, 2017 was admitted to form part of PW1's testimony in chief and part of proceedings when the witness appeared for cross examination and re-examination.

The 1st, 2nd and 3rd defendants also on 14th September, 2017 filed two witness statements of **Shabani Athumani Mshana a.k.a Shabani** ~~W~~

Athumani Mkwema and **Alawi Athumani Mshana** after being granted extension of time. At the hearing of the defendant's case, the 1st, 2nd, and 3rd defendants caused only one witness, **Shabani Athumani Mshana a.k.a Shabani Athumani Mkwema (DW2)**, to testify but they failed to cause **Alawi Athumani Mshana** to attend for cross examination as required by Rule 56 (1) of the Rules.

Rule 56 (2) of the Rules provides that where the witness fails to appear for cross examination, the Court is required to strike out his statement from the record, unless the Court is satisfied that there are exceptional reasons for his failure to appear. Since **Alawi Athumani Mshana** failed to appear for cross examination and no exceptional reasons had been advanced therefore his witness statement is hereby strike out under Rule 56 (2) of the Rules.

On part of the 4th defendant, on 27th April, 2017 he filed one witness statement of **Josephat Aseri Pallangyo (DW1)** which on 13th day of July, 2018 was admitted to form part of DW1's testimony in ~~the~~

chief and part of proceedings when the witness appeared for cross examination and re-examination.


At the trial, four issues were framed, which are:-

1. Whether the Plaintiff entered into loan agreement with the 3rd defendant;
2. Whether the said loan agreement was agreed by the 1st and 2nd defendants and to what extent;
3. What are the reliefs;
4. Whether the landed property known KND/NGB/KGM4/39 located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipal with residential licence number 29387 was pledged as a security to the loan; and
5. Whether the 1st defendant was legally entitled to dispose off the said property to the 4th defendant.

Having summarized the case for the plaintiff and for the defendants, let me now deal with the issues framed. I wish to

combine issues number one and two because they are interrelated. The issues purely hinges on the evidence tendered before the court. It is the testimony of **Ayoub Omari Korogoto (PW1)** that on 15th May, 2012 the plaintiff entered into a master Murabaha facility agreement (hereinafter after referred to as "the agreement") with the 3rd defendant in order to grant a loan of the total sum of Tanzanian Shillings Two Hundred Million (Tshs. 200m). The said agreement was tendered and admitted as Exhibit P1.

The witness for the 1st, 2nd, and 3rd defendants one **Shabani Athumani Mshana a.k.a Shabani Athumani Mkwema (DW2)** in his testimony acknowledged that on 15th May, 2012 with the intention to raise capital in his business, he entered into Murabaha agreement with the plaintiff in order to secure a loan of Tanzania Shillings Two Hundred Million (Tshs. 200m).

Exhibit P1 clearly indicates that it was signed by both parties. On part of the plaintiff, Exhibit P1 was signed by Dr. Idris Rashid, Managing Director and PW1, Company Secretary. For the 1st, 2nd 

and 3rd defendants, it was signed by the 1st and 2nd defendant as directors of the 3rd defendant. The very act of the 1st and 2nd defendants of signing Exhibit P1 on behalf of the 3rd defendant then clearly the defendants agreed to the terms and conditions of Exhibit P1. Section 10 of the Law of Contract Act, Cap. 345 provides that all agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and are not expressly declared to be void. In this case, there is nothing to show that there was no free consent by the parties. It is clear from the testimony of DW2 that the 1st and 2nd respondents were competent to enter into an agreement with the plaintiff on behalf of the 3rd defendant.

Section 34 of the Companies Act of 2002 provides:-

"A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be under its common seal."

In this case, there is no dispute that the 3rd defendant is a limited liability company and the 1st and 2nd defendants are directors of the 3rd defendant who had the mandate to enter into the agreement with the plaintiff on behalf of the 3rd defendant.

It be noted that amongst the terms and conditions of which the 1st, 2nd and 3rd defendants agreed with the plaintiff are such that:

"2.1 The bank promise to sell the shoes to the Customer (i.e 3rd defendant) to maximum amount of Tshs. 212,600,000/= plus profit amount as agreed by both parties and the Customer promise to purchase the shoes form the bank at the contract price. Upon receipt by the bank of the Customer's Purchase Requisition advising the bank to purchase the Shoes and make payment therefore, the bank shall purchase Shoes directly from the Seller. The payment for such Shoes shall be made by the bank directly to the Seller on submission of Purchase Advice/Order by the Customer. ~~the~~

2.2 Upon receipt of purchase of Shoes by the bank from the Seller, the properties shall be at the risk and cost of the bank until such time the properties is sold to the Customer to be evidenced by the acceptance, duly signed and endorsed in the sale agreement "Murabaha Document Number Seven (7)".

2.3 After the purchase of Shoes by the bank, the Customer shall offer to purchase the Shoes from the bank at the Contract Price in the manner provided in the Sale Agreement ""Murabaha Document Number Six (6)".

2.4 The Customer's purchase of Shoes from the bank shall be effected by the exchange of an offer and acceptance between the Customer and the bank as stipulated in the Sale Agreement "Murabaha Document Number Six (6) and Seven (7)".

It follows then that the plaintiff together with the 1st, 2nd and 3rd defendants agreed that the plaintiff will buy the goods directly from the supplier and thereafter the plaintiff will resell the goods to the 3rd defendant with profit margin. ~~WHL~~


With the clear admission from the 1st, 2nd and 3rd defendants coupled with the facts that the said agreement was dully signed by the 1st and 2nd defendants who are the directors of the 3rd defendant, then issues number one and two are answered in the affirmative.

I will skip the third issue and go directly to the fourth issue, that is, whether the landed property known KND/NGB/KGM4/39 located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipal with residential licence number 29387 was pledged as a security to the loan. I will not dwell much on issue number four as it is pertinent clear from the pleadings that the disputed property was not part of the mortgaged property. The plaintiff in her amended plaint under Paragraph 25 stipulated:


"The Plaintiff decided to attach the said Additional Property (i.e disputed property) by reason of the Directors' Personal Guarantee for Unlimited Amount dated 20th November, 2012. The basis of attachment is as provided by Clause 1 of the Personal Guarantee"

which provides that, ".....the Guarantor hereby on a full indemnity basis guarantee on demand to pay to the Lender all moneys and discharge all obligations and liability whether actual or contingent now and hereafter due owing or incurred to the Lender by the Borrower" Further Clause 2.1 provides, "This Guarantee is a continuing security and shall secure the ultimate balance from time owing to the Lender by the Borrower..." Please refer to the Annexure P6 at Paragraph 15 above."

From the above pleading, the attachment of the disputed property was due to the personal guarantee. In other words, the landed property located at Kagera Mikoroshini Street, Ndugumbi, Kinondoni Municipality with residential licence number 29387; KND/NGB/KGM4/39 was not pledged as a security to the plaintiff. Issue number four is therefore answered in negative.

Let me now turn to issue number five that is whether the 1st defendant was legally entitled to dispose off the disputed property to the 4th defendant. Generally in terms of Section 36 (1), (2), (3), (4) 

and (5) of the Land Act, Cap. 113 the occupier of the land has a right to dispose his property including sale as defined under Section 2 of the Land Act, Cap. 113 subject to approval by the Commissioner for Lands and/or designated Officer after being satisfied that the land is free from any encumbrances. In the matter at hand, it is the case of the plaintiff that the disputed plot belongs to the 1st defendant and that by virtue of the Directors' Personal Guarantee for Unlimited Amount dated 20th November, 2012 (Exhibit P6), the plaintiff has a right to attach the disputed property of which she attached it and filed placed three caveats dated 30th October, 2014; 6th May, 2015; and 10th November, 2015. The plaintiff firmly believe that the sale of the disputed property to the 4th defendant was a breach of the signed Directors' Personal Guarantee for Unlimited Amount and therefore illegal.

The 4th defendant on his part through the testimony of **Josephat Aseri Pallangyo** (DW1) asserted that on 11th February, 2014 he signed the contract for purchase of the disputed property from the 1st 

defendant at a contractual price of Tshs. 220m. The said sale agreement was tendered and admitted as Exhibit D1.

DW1 further stated that after purchasing the disputed property, he started paying the purchase price in different and several instalments until the whole amount was paid. He said the first instalment was paid on 31st March, 2014 by depositing Tshs. 57m at CRDB Bank in the name of Mkwema Television Co. Ltd; the second instalment of Tshs. 26m was paid on 14th February, 2014 by depositing to the Stanbic Bank account provided by the 1st defendant in the name of Mkwema Television Co. Ltd; and the third instalment of Tshs. 6m was paid on 19th March, 2014 to the 1st defendant by depositing to the Stanbic Bank account in the name of Mkwema Television Co. Ltd. Five Bank Deposit slips were tendered and admitted collectively as Exhibit D5.

DW1 further testified that the remaining balance of Tshs. 131,000,000/= was paid in cash in small instalments to the 1st defendant up until the whole purchase price was paid in full. He

tendered and it was admitted acknowledgement of receipt of sale price as Exhibit D2. Exhibit D2 is dated 21st May, 2014.

DW1 said on 22nd October, 2014 he presented the contracts to Kinondoni Municipal Council and he tendered the form for payment of fees for transfer of landed property with two exchequer receipts and max malipo receipt which were admitted collectively as Exhibit D3.

DW1 said after he bought the property from the 1st defendant, the plaintiff started to intervene to block the transfer but Kinondoni Municipal having noted that there is no any encumbrance, approved the transfer. DW1 tendered residential licence of the disputed property in his name and it was admitted as Exhibit D4.

From the above testimonies of PW1 and DW1 it is evident that at the time the 4th defendant bought the disputed property, the said disputed property had no any encumbrances. It is gathered through Exhibits D1, D2, and D5 that the sale transactions between the 1st ~~and~~

defendant and 4th defendant started on 11th February, 2014 and it was fully completed on 21st May, 2014. Further as per Exhibit D3 the transfer payments were effected on 22nd and 23rd October, 2014 some few days prior to the 1st caveat placed by the plaintiff. In that the first caveat of 30th October, 2014 was placed after the transfer was completed by the 4th defendant when he paid the transfer fees. It follows then that issue number five has to be answered in the affirmative in that as the disputed had no any encumbrances then the 1st defendant was legally entitled to dispose off the disputed property to the 4th defendant.

I now come back to the third issue that is the reliefs entitled to. I have held herein that the plaintiff and the 1st, 2nd, and 3rd defendants entered into the loan agreement and the said loan agreement was agreed by both parties. The terms of the loan agreement were such that the plaintiff is to buy 700 bags of shoes, sandals and other footwear (hereinafter referred to as "the goods") from Trimpex and Shoes Trading Company based in the United States of America at a

price of Tshs. 200m and thereafter sell the goods to the 3rd defendant by way of Murabaha, that is, cost (being the loan amount) plus profit (being the mark up profit) at a total price of Tanzanian Shillings Two Hundred Twelve Million and Six Hundred Thousand (Tshs. 212,600,000/=).

Section 21(1) of the Sale of Goods Act, Cap. provides :

"Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

It is on evidence through the testimony of PW1 that on 15th April, 2013, the goods were sold to the 3rd defendant and the 3rd ~~defendant~~

defendant through the 1st defendant signed the Bank's acceptance letter, the letter for offer to purchase, and schedule of payment of contract price to acknowledge receipt of goods and confirmed the newly agreed terms with effect from 11th May, 2013. The Bank's acceptance; offer to purchase; schedule of payments of contract price; and confirmation of goods received were collectively admitted as Exhibit P7.

From the above testimony of PW1 and from the exhibits tendered before the Court, it is established on the preponderance of probability that the 1st, 2nd and 3rd defendants took the Master Murabaha Facility and failed to repay the said loan. The loan taken by 3rd defendant is shown in Exhibit P3 and P7 that as at 17th September, 2014 there is outstanding balance of Tshs. 247,131,509.62. The plaintiff is therefore entitled to this claim.

Regarding the claim of Tshs. 3,950,000/= which is alleged to be the legal costs and advertising fees for the attempt on the public auction of the security are not backed by any receipts. specific ~~and~~

damages have to be specifically pleaded and proved, as held in the cases of **Mtali Vs. Mtali [2008] 2 EA 229; Kiptoo Vs. Attorney General [2010] 1 EA 200; and Zuberi Augustino Vs. Anicet Mugabe [1992] TLR 137**. In the matter at hand apart from pleading the claim, there is no evidence adduced or established to show that the plaintiff incurred the said fees and costs. I therefore decline this prayer.

As for prayers for prayers for annulment and attachment of the disputed property, I have held herein that the disputed property was not placed as security as such the 1st defendant had a right to dispose the said property to the 4th defendant. I thus decline the prayers.

In the end, judgment is hereby entered against the 1st, 2nd, and 3rd defendants jointly and severally in favour of the plaintiff and it is hereby decreed that:-

1. Payment of Tanzania Shillings Two Hundred Forty Seven Million, One Hundred Thirty One Thousand, Five Hundred and ~~1000~~

Nine and Sixty Two Cents only (Tshs. 247, 131, 509.62) being the outstanding amount on account of the Murabaha Facility as of 17th September, 2014; and

2. The 1st, 2nd and 3rd defendants shall jointly and severally pay the plaintiff costs of the suit which shall be taxed.

It is so ordered.

Dated at Dar es Salaam this 15th day of January, 2019.



B.M.A Sehel

JUDGE

15th day of January, 2019.